Nos. 00-945 and 00-7360

In the Supreme Court of the United States

A. MICHAEL KAGAN, PETITIONER

v.

UNITED STATES OF AMERICA

BRUNO RUMIGNANI AND EVERETT J. VIEIRA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed plain error in sentencing petitioner Kagan for mail fraud absent a jury finding that the fraud affected a financial institution.

2. Whether the district court committed plain error in enhancing petitioners' offense levels under Sentencing Guidelines § 2F1.1(b)(8)(A) based on the court's—rather than a jury's—finding that their offense "substantially jeopardized the safety and soundness of a financial institution."

3. Whether the Sentencing Commission exceeded its authority by defining a "financial institution," for purposes of Guidelines § 2F1.1, to include an entity that is not federally insured.

4. Whether Guidelines § 2F1.1(b)(8)(A) is unconstitutionally vague.

5. Whether the premium finance company that petitioners defrauded is a "financial institution" for purposes of Guidelines § 2F1.1(b)(8)(A).

6. Whether the district court's denial of petitioner Kagan's motion for severance or a continuance based on his medical condition deprived Kagan of his right to testify in his defense.

7. Whether the district court committed reversible error by instructing the jury that it could infer knowledge from deliberate ignorance.

8. Whether the evidence was sufficient to support Kagan's mail fraud convictions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a)[1] is reported at 219 F.3d 145. A summary order of the court of appeals (Pet. App. 48a-56a) is unpublished, but the decision is noted at 225 F.3d 647 (Table).

[1] "Pet. App." refers to the appendix to the petition in No. 00-945. "C.A. J.A." refers to the joint appendix filed in the Court of Appeals.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2000. Petitions for rehearing were denied on September 6, 2000, in No. 00-7360, and September 7, 2000, in No. 00-945. The petitions for a writ of certiorari were filed on December 5, 2000, in No. 00-7360, and December 6, 2000, in No. 00-945. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, each petitioner was convicted of conspiracy to commit securities fraud, mail fraud, and insurance fraud, and to make false statements to the Securities and Exchange Commission, in violation of 18 U.S.C. 371. Pet. App. 3a. Petitioner Kagan was also convicted of 32 counts of mail fraud, in violation of 18 U.S.C. 1341.[2] Pet. App. 3a; Kagan C.A. App. A428. Petitioner Rumignani was convicted of one count of securities fraud, in violation of 15 U.S.C. 78ff and 78j(b); seven counts of making false statements to the SEC, the U.S. Attorney's Office, and the FBI, in violation of 18 U.S.C. 1001; 17 counts of insurance fraud, in violation of 18 U.S.C. 1033(b)(1); and 37 counts of mail fraud. Pet. App. 3a; C.A. J.A. 1614-1615. Petitioner Vieira was convicted of one count of making false statements to the U.S. Attorney's Office and the FBI, in violation of 18 U.S.C. 1001. Pet. App. 3a-4a; C.A. J.A. 1606. Kagan was sentenced to 70

[2] The mail fraud statute, 18 U.S.C. 1341, which proscribes mailings in furtherance of "any scheme or artifice to defraud," authorizes a term of imprisonment of "not more than five years." Section 1341 further provides, however, that when the offense "affects a financial institution," the defendant shall be sentenced to a term of imprisonment of "not more than 30 years."

months of imprisonment, Rumignani to 121 months of imprisonment, and Vieira to 51 months of imprisonment, each term of imprisonment to be followed by three years of supervised release. C.A. J.A. 1606-1608, 1615-1616; Kagan C.A. App. A429-A430. The court of appeals affirmed. Pet. App. 1a-47a.

1. Petitioner Rumignani was executive vice president of Underwriters Financial Group (UFG), a commercial insurance brokerage firm. Between 1987 and 1995, Rumignani and UFG's president, Donald Ferrarini, embezzled more than $10 million of insurance premiums from UFG's clients and from insurance carriers. In addition, Rumignani and Ferrarini, with the help of petitioner Vieira, who was employed by UFG as a business analyst, defrauded premium finance companies—companies that provide loans to be used in paying insurance premiums—of more than $12 million by submitting fraudulent loan applications, purportedly on behalf of UFG clients. Pet. App. 4a-11a; Gov't C.A. Br. 7-27. Petitioner Kagan was a director of CPF Premium Financing (CPF), one of the companies Rumignani and Ferrarini defrauded. Kagan used his influence at CPF to ensure that the fraudulent loans would be approved; in exchange, he received $425,000 from UFG.[3] CPF eventually became insolvent as a result of UFG's inability to repay the fraudulent premium finance loans, which totaled approximately $4.9 million in principal and interest. Pet. App. 10a-12a; Gov't C.A. Br. 8-9, 21-27.

2. In January 1998, petitioners were indicted on conspiracy and substantive offenses. C.A. J.A. 35-73. In

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[3] Kagan also submitted fraudulent premium finance loan applications to CPF through KBC Systems, Inc. (KBC), an insurance agency that he owned. Pet. App. 12a; Gov't C.A. Br. 8-9, 21.

July 1998, two months before petitioners' trial was scheduled to begin, Kagan suffered a heart attack. Kagan moved for a continuance or to sever his trial from that of the other defendants, and the district court rescheduled the trial for January 1999. Kagan then renewed his motion for severance or a further continuance on the basis of his medical condition. After holding two hearings and reviewing medical evidence submitted by Kagan and by the government, the district court denied the motion, concluding that subjecting Kagan to a trial would not "produce any threat to [his] physical health." Pet. App. 13a-14a; Gov't C.A. Br. 86-94.

In its instructions to the jury at trial, the district court defined the term "knowingly" as follows: "A person acts 'knowingly' if he acts intentionally, voluntarily, and deliberately and not because of a mistake or accident, mere negligence, or other innocent reason." Pet. App. 26a. The court further instructed the jurors that, with respect to the substantive counts, they could find a defendant to have known a particular fact if the evidence showed "beyond a reasonable doubt that the defendant . . . was aware that there was a high probability of a fact, but deliberately and consciously avoided confirming this fact." *Id.* at 22a-23a. Similarly, with respect to the conspiracy count, the court instructed the jury that it could find a defendant to have known of the unlawful objectives of the conspiracy if it found "beyond a reasonable doubt that the defendant * * * was aware of a high probability" that the conspiracy's unlawful goals existed, "but deliberately and consciously avoided confirming their existence." *Id.* at 28a. Petitioners did not request an instruction requiring the jury to determine whether their mail fraud offenses affected a financial institution, and the

district court gave no such instruction. The jury found petitioners guilty of most of the charges against them.

The presentence reports (PSRs) prepared for petitioners' sentencing set forth the statutory maximum sentence for each count of conviction. With respect to the mail fraud counts, the PSRs noted that petitioners were subject to a maximum term of five years of imprisonment on each count under 18 U.S.C. 1341. Kagan PSR ¶ 128; Rumignani PSR ¶ 127.

At sentencing, the district court enhanced each petitioner's offense level under Sentencing Guidelines § 2F1.1(b)(7)(A) (1999), which provided for a four-level increase if the offense of conviction "substantially jeopardized the safety and soundness of a financial institution." Pet. App. 36a. The district court concluded that CPF was a "financial institution" for purposes of that provision.[4] *Ibid.* The district court did not, however, make any finding that the mail fraud offenses involved a "financial institution" within the meaning of 18 U.S.C. 1341, and the court did not reject the PSRs' conclusion that the statutory maximum for each mail fraud count was five years of imprisonment.

3. On appeal, Kagan argued that his heart condition precluded him from testifying in his own defense at trial and that the district court's denial of his motion for severance or for a continuance therefore deprived him of his right to testify. Pet. App. 14a. The court of appeals agreed that, in ruling on Kagan's motion, "the district court was required to assess his physical ability to be a witness in his own defense." *Id.* at 18a. Moreover, the court of appeals held that the district court

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[4] Sentencing Guidelines (Guidelines) § 2F1.1(b)(7)(A) (1999) has since been renumbered as Section 2F1.1(b)(8)(A). See Guidelines App. C, amend. 596 (Nov. 1, 2000).

could not "satisfy that obligation simply by stating the generic conclusion that the defendant is physically able to proceed to trial." *Id.* at 17a. The court of appeals concluded, however, that the district court found that Kagan's heart condition did not prevent him from testifying at trial and that this finding was "amply supported by the evidence in the record." *Id.* at 19a. Therefore, the court of appeals held that the denial of Kagan's motion for severance or a continuance "did not deprive him of his constitutional right to testify." *Id.* at 22a.

Kagan and Vieira also claimed that the district court erred in giving the jury "conscious avoidance" instructions with respect to the conspiracy and fraud counts.[5] Pet. App. 23a. The court of appeals agreed that, because there was no evidence that Vieira or Kagan consciously avoided learning that the loans were fraudulent, the instructions should not have been given, but the court further concluded that the error was harmless. *Id.* at 22a-36a. The court noted that "the jury was properly instructed on actual knowledge" and that there was "overwhelming evidence that Vieira actually knew of the fraudulent nature of the loans," including evidence of his presence at meetings at which the fraudulent scheme was discussed. *Id.* at 33a-34a. For the same reason, the court found the instruction error harmless with respect to Kagan, noting that there was "evidence beyond peradventure that Kagan, like Vieira, actually knew the loans were fraudulent," including evidence that "Kagan himself proposed the logistics

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[5] Courts refer to instructions similar to the ones given in this case as "conscious avoidance" or "deliberate ignorance" instructions, and we use those terms interchangeably in this brief.

for deceiving a suspicious premium finance company." *Id.* at 35a-36a.

Petitioners also challenged the district court's enhancement of their offense levels under Sentencing Guidelines § 2F1.1(b)(7)(A) (1999). Pet. App. 36a-46a. They claimed that the Sentencing Commission exceeded its statutory authority when it defined a "financial institution" to include an entity that is not federally insured.[6] *Id.* at 37a-41a. They relied on the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 961(m), 103 Stat. 501, in which Congress directed the Sentencing Commission to promulgate guidelines or to amend existing guidelines "to provide for a substantial period of incarceration" for offenses "that substantially jeopardize[] the safety and soundness of a federally insured financial institution." Pet. App. 38a-39a. The court of appeals pointed out, however, that this provision of FIRREA "is not the sole source of the Commission's authority to define a 'financial institution.'" *Id.* at 40a. The court concluded that the

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[6] The commentary to Section 2F1.1 defines the term "financial institution"

> to include * * * any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association, brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government.

Guidelines § 2F1.1, Application Note 19 (formerly Application Note 16, see Guidelines App. C, amend. 596 (Nov. 1, 2000)).

Sentencing Commission had authority, "in the exercise of [its] general statutory powers under § 994(a) of the Sentencing Reform Act," 28 U.S.C. 994(a), to adopt a definition of "financial institution" that was "broader than that suggested in FIRREA." Pet. App. 40a-41a.

The court of appeals also rejected petitioners' claim that the district court erred in finding that CPF was a "financial institution" for purposes of applying the guideline enhancement because the liquidation of CPF caused no harm to the public. Pet. App. 42a-46a. Even if the term "financial institution" were limited to entities the liquidation of which would injure the public, the court explained, there was evidence that CPF's collapse had resulted in financial losses to the banks from which CPF had borrowed money to make the fraudulent premium finance loans. *Id.* at 44a-45a. Noting that the definition of "financial institution" includes "varied and sundry forms of banks and 'any similar entity, whether or not insured by the federal government,'" the court concluded that "premium finance companies, including CPF, are entities whose financial peril endangers the general public and whose functions are sufficiently bank-like to constitute financial institutions within the meaning of Application Note 16." *Id.* at 45a-46a.

In a separate summary order, the court of appeals ruled that petitioners' challenges to the sufficiency of the evidence to support their convictions, as well as their claims that the district court erred in its evidentiary rulings and in calculating their sentences under the Guidelines, were "without merit." Pet. App. 48a-56a. In rejecting Kagan's claim that the evidence was insufficient to support his mail fraud convictions relating to the fraudulent premium finance loan applications on behalf of KBC, the court noted that Kagan

had signed all of the loan applications and that there was "ample evidence" showing that CPF routinely mailed notices showing that the fraudulent loans had been approved. *Id.* at 50a.

ARGUMENT

1. Kagan contends (00-945 Pet. 10-15) that his sentence was imposed in violation of this Court's decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), because the indictment did not allege, and the jury was not required to find beyond a reasonable doubt, that his mail fraud offenses affected a financial institution. In *Apprendi*, the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363.

Under 18 U.S.C. 1341, a defendant who is convicted of mail fraud is subject to a maximum term of imprisonment of "not more than five years." When the offense "affects a financial institution," however, Section 1341 authorizes a term of imprisonment of "not more than 30 years." Imposition of a sentence above five years on one of the mail fraud counts on the basis of a determination by the district court (rather than a jury) that the offenses affected a financial institution would therefore have been error under this Court's decision in *Apprendi*.[7]

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[7] The absence of an allegation in the indictment of an effect on a financial institution would not have been error under *Apprendi*, however, because that case, which involved a state conviction, did not resolve any issue concerning what must be charged in a federal indictment. See 120 S. Ct. at 2355 n.3.

In this case, however, Kagan's presentence report (PSR) stated that the statutory maximum sentence on each mail fraud count was five years of imprisonment (see Kagan PSR ¶ 128), and nothing in the sentencing transcript or the judgment suggests that the district court rejected that conclusion or that the court imposed concurrent 70-month terms of imprisonment on each of the counts of conviction. Under those circumstances, it is reasonable to assume that the court properly imposed concurrent sentences of 60 months of imprisonment on each of the mail fraud counts, and a consecutive sentence on one of the other counts, to achieve the total Guidelines sentence of 70 months of imprisonment. See 18 U.S.C. 3584; Guidelines § 5G1.2(d) ("If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment [under the Guidelines], then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment."). Because a 60-month sentence was authorized by Section 1341 without regard to whether the offense affected a financial institution, *Apprendi* provides no basis to conclude that the term of imprisonment imposed on Kagan was unconstitutional.[8]

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[8] The same reasoning applies to petitioner Rumignani, whose sentence of 121 months of imprisonment is well within the combined statutory maximums for the offenses of which he was convicted. See Rumignani PSR ¶ 127. This Court has recently denied several petitions for certiorari raising challenges to sentences imposed under 21 U.S.C. 841 that were within the lowest applicable statutory maximum. See, *e.g.*, *Anthony* v. *United States*, 121 S. Ct. 313 (2000) (No. 00-5188); *Rios-Quintero* v. *United States*, 121 S. Ct. 301 (2000) (No. 99-9905); *Medina* v. *United States*, 121 S. Ct. 157 (2000) (No. 99-10173); *Foye* v. *United*

2. Rumignani and Vieira contend (00-7360 Pet. 10-17) that the district court violated *Apprendi* by applying Guidelines § 2F1.1(b)(8)(A) to enhance their sentences, based on the court's determination that their offenses "substantially jeopardized the safety and soundness of a financial institution," regardless whether the sentences imposed exceeded the statutory maximum for those offenses. Contrary to that contention, this Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that, so long as the statutory minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998).

Apprendi did not hold otherwise. See *Apprendi*, 120 S. Ct. at 2366 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held.") (citing *Edwards*, 523 U.S. at 515). The Guidelines merely "channel the sentencing discretion of the district courts and * * * make mandatory the consideration of factors" that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see also *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). A district court has the power to "depart from the applicable Guideline range if 'the court finds that there exists an aggra-

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States, 121 S. Ct. 153 (2000) (No. 99-10143); *Littles* v. *United States*, 121 S. Ct. 81 (2000) (No. 99-8992). There is no reason for a different result in this case.

vating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). Because the Guidelines leave the sentencing court with significant discretion to impose a sentence within the statutory range, and, because specific offense characteristics and sentencing adjustments under the Sentencing Guidelines cannot increase the statutory maximum penalty for a criminal offense, *Apprendi* does not support a challenge to the constitutionality of the Guidelines. See Guidelines § 5G1.1; *Edwards*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines"). All the courts of appeals that have addressed the question have rejected efforts to apply *Apprendi* to claims under the Guidelines. See, *e.g.*, *United States* v. *Williams*, 235 F.3d 858 (3d Cir. 2000); *United States* v. *Kinter*, 235 F.3d 192 (4th Cir. 2000), petition for cert. pending, No. 00-8591; *United States* v. *Doggett*, 230 F.3d 160, 166 (5th Cir. 2000), cert. denied, No. 00-7819 (Feb. 20, 2001); *Hernandez* v. *United States*, 226 F.3d 839, 841-842 (7th Cir. 2000); *United States* v. *Lewis*, 236 F.3d 948 (8th Cir. 2001); *United States* v. *Hernandez-Guardado*, 228 F.3d 1017, 1024-1027 (9th Cir. 2000); *United States* v. *Heckard*, No. 99-2186, 2001 WL 15532 (10th Cir. Jan. 8, 2001); *United States* v. *Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000).

3. Petitioners raise several additional challenges to the district court's enhancement of their sentences under Guidelines § 2F1.1(b)(8)(A): they argue that the definition of "financial institution" in Application Note 19 to Section 2F1.1 is unconstitutionally vague, that the Sentencing Commission exceeded its statutory author-

ity in defining "financial institution" to include entities that are not federally insured, and that the district court erred in finding that CPF was a "financial institution." 00-945 Pet. 24-29; 00-7360 Pet. 18-26. None of those claims warrants review by this Court.

a. Kagan claims (00-945 Pet. 24-26) that the reference to "any similar entity" in Application Note 19 to Guidelines § 2F1.1 is "impermissibly vague." Petitioner does not cite—and we have not found—any decision holding Application Note 19 unconstitutional on vagueness grounds. Absent such a holding, review by this Court is unnecessary.

Moreover, petitioner's vagueness challenge lacks merit. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 525 (1994) (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)). The Sentencing Guidelines, however, "do not define illegal conduct." *United States* v. *Wivell*, 893 F.2d 156, 160 (8th Cir. 1990). Rather, as the Seventh Circuit explained in rejecting a claim identical to the one petitioner raises here, the Guidelines merely "assist and limit the discretion of the sentencing judge," and "the discretionary limitations the Guidelines place on the sentencing judge do not violate a defendant's right to due process by reason of vagueness." *United States* v. *Brierton*, 165 F.3d 1133, 1139 (1999); see *Wivell*, 893 F.2d at 160.

b. Petitioners also renew their claim (00-945 Pet. 26-28; 00-7360 Pet. 18-22) that the Sentencing Commission exceeded its statutory authority under FIRREA by defining "financial institution" for purposes of Guidelines

§ 2F1.1 to include entities that are not federally insured. As the court of appeals correctly pointed out (Pet. App. 40a-41a), however, FIRREA "is not the sole source of the Commission's authority to define a 'financial institution,'" and the Commission's adoption of a broader definition than required by FIRREA was a proper exercise of its "general statutory powers" under the Sentencing Reform Act. So long as it does not purport to authorize or require sentences outside the ranges established by statute, the Commission "enjoys significant discretion in formulating guidelines" for sentencing in federal criminal cases. *Mistretta* v. *United States*, 488 U.S. 361, 377 (1989); see 28 U.S.C. 994(a). That discretion easily encompasses the authority to require imposition of longer terms of imprisonment for defendants whose fraudulent conduct jeopardizes the safety of a financial institution, regardless whether the institution is federally insured.

Moreover, contrary to petitioners' suggestion, there is no inconsistency between the definition of "financial institution" in Application Note 19 and FIRREA's specific directive to the Commission. Section 961(m) of FIRREA requires the Commission to "provide for a substantial period of incarceration" for offenses "that substantially jeopardize[] the safety and soundness of a federally insured financial institution." 103 Stat. 501. Nothing in FIRREA precludes the Commission from also mandating longer sentences for offenses that jeopardize the safety of similar institutions that are not federally insured.

c. Petitioners also contend (00-945 Pet. 28-29; 00-7360 Pet. 22-26) that CPF was not a "financial institution" within the meaning of Application Note 19. The court of appeals found (Pet. App. 44a-46a), however, that, because CPF was "in the business of borrowing

money from parties, whom it was obligated to repay, and of lending out that borrowed money at a higher interest rate," it was "very like a bank" and therefore was properly classified as a "financial institution" under Application Note 19. Petitioners' disagreement with that ruling is limited to the particular facts of this case and does not merit review by this Court.

In any event, because the issue is one of interpretation and application of the commentary to a sentencing guideline, the Court should leave the question to the Sentencing Commission. *Braxton* v. *United States*, 500 U.S. 344, 348 (1991). The Sentencing Commission is charged with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Ibid.*

4. Petitioner Kagan raises three additional challenges to his convictions. Those claims were correctly rejected by the court of appeals, and none merits further review.

a. First, Kagan renews his claim (00-945 Pet. 15-19) that the district court's denial of his motion for severance or for a continuance caused him involuntarily to waive his right to testify. Kagan contends (*id.* at 18) that this Court's review is needed to resolve a conflict among the circuits concerning the extent of a trial court's obligation to protect the defendant's right to testify at trial, and he urges the Court to hold that, when the defendant raises the issue of his physical ability to testify, the trial court has an "affirmative obligation" to inquire into the defendant's capacity to testify. In this case, however, the court of appeals held that the district court *did* have an obligation "to assess [Kagan's] physical ability to be a witness in his own defense." Pet. App. 18a; see also 00-945 Pet. 15, 18, 19

(acknowledging that fact). Moreover, the court of appeals held that the district court could not "satisfy that obligation simply by stating the generic conclusion that the defendant is physically able to proceed to trial." Pet. App. 17a. The court of appeals concluded that the district court found that Kagan's heart condition did not prevent him from testifying at trial and that this finding was "amply supported by the evidence in the record." *Id.* at 19a. Resolution by this Court of any disagreement among the courts of appeals about the circumstances under which a trial court is required to inquire into the defendant's capacity to testify should await a case (unlike this one) in which the Court's decision might affect the outcome.

Kagan further argues (00-945 Pet. 18-19) that the district court erred in finding that his medical condition did not preclude him from testifying at trial. That fact-bound claim, rejected by both courts below, does not warrant further review.

b. Kagan also challenges (00-945 Pet. 20-23) the court of appeals' conclusion that, in light of the overwhelming evidence that Kagan had actual knowledge that the premium finance loans were fraudulent, it was harmless error for the district court to instruct the jury on deliberate ignorance. In particular, Kagan asserts that the court of appeals erred in finding that the deliberate ignorance instruction constituted harmless error because the jury could have based its guilty verdict on the deliberate ignorance theory, rather than on the evidence of his actual knowledge.

That argument fails because the jury could not have convicted Kagan based on deliberate ignorance. This Court has made clear that the "'crucial assumption' underlying the system of trial by jury 'is that juries will follow the instructions given them by the trial judge.'"

Marshall v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983) (quoting *Parker* v. *Randolph*, 442 U.S. 62, 73 (1979)); see *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987) (presumption that juries follow their instructions is "almost invariable"). The court of appeals concluded (Pet. App. 35a) that there was insufficient evidence to prove Kagan's knowledge based on a deliberate ignorance theory beyond a reasonable doubt. The jury instructions on deliberate ignorance, however, informed the jury that they could find that a defendant acted knowingly if the evidence showed "*beyond a reasonable doubt* that the defendant . . . was aware that there was a high probability of a fact, but deliberately and consciously avoided confirming this fact." *Id.* at 22a-23a (emphasis added); see also *id.* at 28a (jury could find defendant knew of unlawful objectives of conspiracy if it found "*beyond a reasonable doubt* that the defendant * * * was aware of a high probability" that unlawful objectives existed, "but deliberately and consciously avoided confirming their existence") (emphasis added). Accordingly, a jury following the district court's instructions, as a reviewing court must assume that it did, and finding no evidence of deliberate ignorance, could not have convicted petitioner on grounds of deliberate ignorance.

This Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991), confirms that analysis. In *Griffin*, the defendant was charged with a single count of conspiracy to defraud the federal government. The conspiracy allegedly had two objects: (1) to hinder the Internal Revenue Service in the performance of its official duties; and (2) to hinder the Drug Enforcement Administration (DEA) in the performance of its official duties. *Id.* at 47. At trial, the government produced no evidence that connected Griffin with an effort to inter-

fere with the DEA. The trial court instructed the jury, over Griffin's objection, that it could convict Griffin of conspiracy if she had participated in either of the two objects of the conspiracy. The jury returned a general verdict of guilty against Griffin and her two co-defendants. *Id.* at 48.

This Court held that the jury's verdict must stand. *Griffin*, 502 U.S. at 60. The Court found no precedent to support Griffin's claim that a general verdict must be set aside when "one of the possible bases of conviction was neither unconstitutional * * * nor even illegal * * * but merely unsupported by sufficient evidence." *Id.* at 56. The Court concluded that it was reasonable to distinguish between a jury instruction that misstates the law and one that presents a theory of conviction that is not supported by the evidence:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence.

Id. at 59; see also *Sochor* v. *Florida*, 504 U.S. 527, 538 (1992) ("We reasoned [in *Griffin*] that although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by evidence.").

Under the jury instructions in this case, petitioner could have been convicted if he either knew that the premium finance loans were fraudulent or kept himself in deliberate ignorance of that fact. As the court of appeals found (Pet. App. 35a), there was "evidence beyond peradventure that Kagan * * * actually knew the loans were fraudulent," and petitioner does not claim that the instruction on actual knowledge was faulty in any way. Accordingly, the submission to the jury of the deliberate ignorance theory—even if the evidence at trial was insufficient to support that theory—does not warrant reversal. See *United States* v. *Mari*, 47 F.3d 782, 786 (6th Cir.), cert. denied, 515 U.S. 1166 (1995); *United States* v. *Adeniji*, 31 F.3d 58, 63-64 (2d Cir. 1994); *United States* v. *Stone*, 9 F.3d 934, 937-942 (11th Cir. 1993), cert. denied, 513 U.S. 833 (1994).[9]

c. Finally, Kagan renews his challenge (Pet. 29-30) to the sufficiency of the evidence to support his mail fraud convictions. That claim has no significance beyond the particular facts of this case and was properly considered and rejected by the court of appeals. Pet. App. 50a; see Gov't C.A. Br. 58-63. Further review is not warranted.

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[9] Although the Eighth and Ninth Circuits have indicated that the giving of an erroneous deliberate ignorance instruction may not be harmless error when the evidence of actual knowledge is not overwhelming, those courts have agreed that it is harmless when (as in this case) the evidence of actual knowledge is overwhelming. See *United States* v. *Covington*, 133 F.3d 639, 644-645 (8th Cir. 1998); *United States* v. *Sanchez-Robles*, 927 F.2d 1070, 1075 (9th Cir. 1991).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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